

DEC 15 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

BRAD TARRELL CONWAY,

Petitioner - Appellant,

v.

GARY LEWIS,

Respondent - Appellee.

No. 02-55570

D.C. No. CV-00-07350-GLT

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted December 4, 2003
Pasadena, California

Before: PREGERSON, COWEN,** and W. FLETCHER, Circuit Judges.

Petitioner-Appellant Conway seeks a writ of habeas corpus under 28 U.S.C.
§ 2254. He claimed in the district court, and urges to us on appeal, that his rights

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

under *Batson v. Kentucky*, 476 U.S. 79 (1986), were violated by peremptory strikes of black jurors during voir dire in California Superior Court.

During proceedings in the district court, the state had a copy of the transcript of the voir dire hearing that it submitted to the district court. However, according to the state in oral argument before us, that transcript was not provided to Conway, who was incarcerated and not represented by Counsel. There was no evidentiary hearing in the district court. Counsel was appointed for Conway on appeal to this Court.

Because of lacunae in the record, we are unable to ascertain with clarity what happened in the Superior Court. In part, the difficulty appears to stem from the fact that Conway was not represented in the district court. We remand to the district court for appointment of counsel, and for such further development of the record as the district court deems appropriate. Proceedings on remand may include, if appropriate, an evidentiary hearing. *See* 28 U.S.C. § 2254(e)(2). We also alert the district court to our recent decision in *Collins v. Rice*, 2003 WL 22519423 (9th Cir. 2003), which was decided after the district court reached its decision in this case.

We accordingly **VACATE** the decision of the district court and **REMAND** for further proceedings.